NO. 13179

IN THE SUPREME COURT

OF THE STATE OF MONTANA

THE MONTANA WILDERNESS ASSOCIATION, and GALLATIN SPORTSMEN'S ASSOCIATION, INC.,

Plaintiffs and respondents,

vs.

THE BOARD OF HEALTH AND ENVIRONMENTAL SCIENCES OF THE STATE OF MONTANA; THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES OF THE STATE OF MONTANA,

Defendants and Appellants,

and

BEAVER CREEK SOUTH, INC., a corporation

Intervenor and Appellant.

SUPPLEMENTARY BRIEF OF AMICUS CURIAE, MONTANA ENVIRONMENTAL QUALITY COUNCIL

APPEARANCES:

JAMES H. GOETZ
15 South Tracy, Suite 8
Bozeman, Montana 59715
Attorney for
Plaintiffs and
Respondents

G. STEVEN BROWN
A. MICHAEL SALVAGINI
1424 9th Avenue
Helena, Montana 59601
Attorneys for
Defendants and
Appellants

DZIVI, CONKLIN, JOHNSON & NYBO
WILLIAM CONKLIN
529 Northwestern Bank Building
Great Falls, Montana 59401
Attorneys for Intervenor
and Appellant

Appealed from the
DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
In and For the County of Lewis and Clark

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INTRODUCTION

In their reply brief filed with this Court on March 3, 1976, the Defendent-Appellant Department of Health and Environmental Sciences Department raised a number of new statutory and constitutional issues with respect to the authority of the Montana Environmental Quality Council (EQC) to issue guidelines, and suggested that it would be a violation of the separation of powers doctrine for the Court to consider such guidelines. Because of the importance of the constitutional questions involved, and because we have had no opportunity to address these newly raised issues, the EQC submits this supplementary brief to demonstrate that the Montana Environmental Policy Act (MEPA), 69-6501 et seq, R.C.M. 1957, does provide sufficient authority for the issuance of guidelines, and that the only danger to the separation of powers lies in the Department's unfounded challenge to EQC's authority.

I. THE EQC'S GUIDELINES ARE ENTITLED TO GREAT WEIGHT IN THE COURTS'S CONSIDERATION

The Department, on pages 5 and 6 of their reply brief, characterise as "legal hocus pocus" the suggestion that this court may take into consideration the guidelines and opinions of the EQC, the agency of state government explicitly entrusted by the legislature with the duty to review and appraise executive agency compliance with the policies of MEPA. The EQC submits that it is for this Court, not the Department of Health, to determine whether a Legislative agency's opinions are relevant,

and what weight they should be given.

In similar situations, the Federal courts have consistently given weight to the guidelines of the President's Council on Environmental Quality, even though those guidelines, like the EQC's, lack the binding effect of law:

> When faced with the problem of statutory construction, this court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. * * * While CEQ is not strictly charged with administration of NEPA, it is charged with the duty of reviewing and appraising agency compliance with the statute, and so is entitled to deference. 42 USC 4344(3) This deference is heightened when, as here, the administrative interpretation is adopted soon after passage of the legislation. Sierra Club v. Morton, 514 F2d 856 (D.C.Cir. 1974), at 873, n. 24 (Emphasis supplied.)

The EQC has already described at considerable length the nature and origin of the guidelines and why we consider them relevant. (EQC Brief, p. 7 et seq.) It is not necessary to repeat those arguments at this point, except to remind the Court that the guidelines were not cut arbitrarily out of whole cloth by the Council. They are the result of a careful distillation of years of judicial and administrative experience on the state and federal levels, and reflect the judgment of the one agency responsible for oversight of MEPA implementation, as to the proper interpretation of the Act. We feel it is much more than "legal hocus pocus" to recommend for the Court's consideration the opinions of a co-equal branch of government.

II. MEPA PROVIDES AMPLE STATUTORY AUTHORITY FOR THE PROMULGATION OF GUIDELINES BY THE EQC.

The Department argues that the EQC has no authority, either express or implied, to issue guidelines of any kind. (Department's

Reply Brief, p. 6 et seq.) In attempting to make this argument, the Department first tells us that "administrative officers and agencies" have only such powers as are conferred on them by law, and then argues at length that the EQC is not an "agency" to begin with. The Department further confuses the issue by pointing out that the Montana Administrative Procedures Act (MAPA) (82-4201 et seq, R.C.M. 1947) does not apply to legislative agencies such as the EQC, and concludes from this that the EQC does not have the power to issue guidelines.

This "argument" is little more than a non sequitor. The MAPA does not confer rule-making authority on state agencies. On the contrary, it limits rule-making authority by imposing on agencies certain procedural requirements. As the Department points out, legislative agencies are exempt from those requirements. More to the point, the EQC has never attempted to promulgate rules or regulations which would have the binding effect of law. As will be explained below, the EQC guidelines perform an entirely different function. The Department's arguments based on the MAPA and the authority of administrative agencies are therefore completely irrelevant.

At page 6 of its reply brief, the Department quotes from Guillot v. The State Highway Commission, 102 Mont. 149, 154, 56 P.2d 1072:

> In addition to powers expressly conferred upon...(a public officer)...by law, an officer has by implication such powers as are necessary for the due and efficient exercise of those expressly granted, or such as may be fairly implied therefrom...

The Department continues with the quotation:

> "...(T)his court has rather narrowed this rule, by declaring that such agencies have only those implied powers which are 'indispensible' in order to carry out those expressly granted, and that, where there is a fair and reasonable doubt as to the existence of a particular power, it must be resolved against the existence of the power."

The Court should be aware, however, that the Department conveniently omitted the first clause of this sentence:

> "With reference to municipal corporations, this court has rather narrowed this rule..." 102 Mont. at 154 (Emphasis supplied.)

This limitation on the authority of municipal corporations has absolutely no bearing on the authority of an agency of the Legislature of the State of Montana. The following discussion will show that the EQC guidelines have been developed and used as a tool to facilitate "the due and efficient exercise" of expressly granted powers, and the authority to issue such guidelines may therefore be "fairly implied" from the language of MEPA.

A. THE GUIDELINES ARE A NECESSARY TOOL FOR THE EFFECTIVE PERFORMANCE OF EQC'S STATUTORY DUTIES

In 1971, the Legislature, in the Montana Environmental Policy Act (MEPA) 69-6501, et seq., R.C.M. 1947, declared it to be

> the continuing responsibility of the state of Montana to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate state plans, functions, programs and resources (emphasis added)

to assure the preservation and enhancement of a wide range of environmental values. (69-6503(a) R.C.M. 1947) In addition to declaring that every person is "entitled to a healthful environment"

and noting that each person "has a responsibility to contribute to the preservation and enhancement of the environment," (69-6503 R.C.M. 1947) MEPA addresses itself specifically to the various state agencies, directing that

> to the fullest extent possible, (a) the policies, regulations, and laws of the state shall be interpreted and administered in accordance with the policies set forth in this act, and (b) all agencies of the state shall
> (1) utilize a systematic, interdisciplinary approach...in planning and decision making...
> (2) include in every recommendation or report on proposals for projects, programs, legislation and other major actions of state government significantly affecting the quality of the human environment, a detailed statement.... (69-6504) (emphasis added)

The preparation of these environmental impact statements (EISs) has become the most important practical procedure through which state agencies have responded to the responsibilities imposed upon them by MEPA. The language of MEPA makes clear that mechanical and superficial compliance with the policies and procedures set out in the act will not be sufficient. Agencies are required, "to the fullest extent possible," to make consideration of environmental factors an essential part of their programs and policies.

The legislature was not content to leave the adoption of MEPA's policies completely to the judgment of those agencies on whom the burden of implementation was to fall. Section 8 of MEPA created the Environmental Quality Council (EQC), a legislative agency, and entrusted to the executive staff of EQC the responsibility (inter alia)

> (b) to review and appraise the various programs and activities of the state agencies in the light of the policy set forth in section 3[69-6503] for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such

> policy, and to make recommendations to the governor and the legislative assembly with respect thereto...
>
> (c) to develop and recommend to the governor and the legislative assembly, state policies to foster and promote the improvement of environmental quality..
>
> (i) to review and evaluate operating programs in the environmental field in the several agencies to identify actual or potential conflicts, both among such activities, and with a general ecological perspective, and to suggest legislation to remedy such situations (69-6514 R.C.M. 1947) (emphasis added)

In addition, all state agencies were to submit to the EQC by July 1, 1972, their proposals for revising agency authority and policies to bring them into conformity with the requirements of MEPA (69-6505 R.C.M. 1947). Furthermore, all state agencies are required to submit copies of their Environmental Impact Statements (EISs) to the EQC for review. (69-6504(b)(3), R.C.M. 1947)

Thus, it is the responsibility of the EQC to review, appraise and evaluate agency programs and activities, to determine whether those programs and activities are in compliance with the policies of MEPA, and to identify conflicts among agency programs and with the ecological perspective of MEPA. Faced with these responsibilities, it was necessary for EQC to develop procedures to (1) keep tabs on environment-related activities of the various state agencies; (2) evaluate those activities to see if they comply with MEPA; (3) compare the activities of the various agencies with one another to detect any inconsistencies; (4) reach conclusions based on those observations; and (5) make recommendations to the governor and the legislature based on those conclusions.

Keeping tabs on agency actions is a voluminous but relatively straightforward undertaking. EQC developed many analytical and cataloguing devices to assist in this task. Evaluating and comparing agency activities and making recommendations based on these judgments required techniques of a different kind. In order to evaluate agency activity in light of MEPA's policies, it was necessary for EQC to interpret and construe ambiguous and vague portions of the statute. These interpretations could then be applied to agency action and the appraisals made. It is generally recognized that an agency charged with the administration of a statute may interpret and construe that statute in order to perform its functions:

> Where there is an ambiguity in the statute as to whether the latter does or does not cover a particular matter, a practical construction of the statute shown to have been the accepted construction of the agency charged with administering the matters in question under the statute will be one factor which the court may take into consideration as persuasive as to the meaning of the statute. E. C. Olsen Co. v. State Tax Commission, 109 Utah 563, 168 P2d. 324 (1946)

See also, Skidmore v. Swift & Co. 323 US 134 (1944). While these and other cases recognizing the validity of agency interpretation of statutes are concerned specifically with administrative or executive agencies, the reasoning applies with equal force to a legislative agency such as EQC. Regardless of the branch of government with which an agency is affiliated, when it is given the statutory responsibility to appraise and evaluate activities and to make recommendations based on those appraisals, interpretation of the statute by that agency is an essential and

unavoidable concomitant to the performance of its duties.

How, for example, can the EQC appraise agency compliance with the directive to prepare EISs on "proposals for projects, programs, legislation, and other major actions of state government significantly affecting the quality of the human environment," (69-6504 (b)(3), R.C.M. 1947) without construing the meaning of such terms as "major actions," and "significantly affecting," or without making some judgment as to what constitutes an adequate Environmental Impact Statement? Such interpretations of the statute are necessary in order for the EQC to perform its statutory duties, and such interpretations have validity not because the EQC directly administers the statute, but because the interpretations are "based upon more specialized experience and broader investigations and information" than are available to other branches or agencies of the government. Skidmore v. Swift and Company, supra.

But if EQC is to evaluate agency programs as well as isolated activities, and if programs of various agencies are to be compared for consistency, EQC's evaluations must, themselves, be consistent. An ad hoc, case-by-case evaluation of agency actions would have been one approach to the problem, but the drawbacks to that approach are obvious. There would have been no guarantee of consistency or uniformity in the determinations made by EQC

An observation that an agency's actions "are contributing to the achievement of [the policies of MEPA]" in one instance, might have little useful relationship to a contrary observation of another agency's actions, or the actions of the same agency at another time.

The evaluation of programs over a period of time, the comparison of many diverse programs, and the process of basing recommendations on these evaluations and comparisons, made a structured, uniform appraisal system imperative.

The guidelines were developed as just such an appraisal system; a standard against which agency actions can be measured; a standard which represents EQC's interpretation of the intent of MEPA. Agency actions can be compared with the guidelines, and notice can be taken when agency procedures depart substantially from the procedures outlined by the guidelines. In this way, EQC's evaluations of agency performance are uniform and self-consistent. A meaningful collection of observations can be accumulated which are relevant to a wide range of agency programs and activities because the same criteria were applied uniformly throughout. Recommendations to the governor and the legislature for program revisions and legislation are then firmly based on that collection of observations.

In this way, the guidelines assist EQC in monitoring, reviewing and evaluating agency activity, detecting inconsistencies and deficiencies in agency compliance with MEPA, and providing the basis for recommendations to the legislature and the governor, all of which functions are explicity mandated by MEPA. The job could possibly have been done without guidelines, but not nearly as efficiently, as systematically, as consistently, or as impartially. An agency of the legislature is entitled to use any reasonable device not inconsistent with its statutory mandate in the performance of its assigned duties. "The grant of an express power is

always attended by the incidental authority fairly and reasonably necessary or appropriate to make it effective." Cammarata v. Essex County Park Commission, 140 A2d 397 (N.J., 1958). See also Warren v. Marion County 353 P2d 257 (Ore., 1960). The Environmental Quality Council believes that promulgation of guidelines is a reasonable and effective device for monitoring, appraising and collecting information and is therefore well within the proper scope of EQC's authority.

Furthermore, the legislature agrees with this assessment and has explicitly approved the device of guidelines. House Joint Resolution 0073 passed by the legislature in 1974, declares that,

> WHEREAS, the Montana Environmental Policy Act and the guidelines adopted pursuant to that act by the state Environmental Quality Council define human environment to include social, economic and cultural factors as well as aesthetic and environmental factors; and
>
> WHEREAS, the act and guidelines further require a rigorous consideration of all alternative actions and the full range of their economic and environmental costs and benefits;...
>
> NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:
>
> That all agencies of state government are hereby directed to achieve forthwith the full implementation of the Montana Environmental Policy Act including the economic analysis requirements of sections 69-6504 through 69-6514 and guidelines for fully integrated environmental and economic analysis of major actions with significant effects on the human environment;... (emphasis added)

Thus the legislature of the state of Montana has not only recognized and accepted the practice of promulgation of guidelines

by EQC, it has also declared them to be, in at least one respect, an accurate representation of the legislative intent of MEPA. This Court has held that such legislative constructions of a statute, while not conclusive, are entitled to respectful consideration. State v. Erickson, 75 Mont. 429, 244 P. 287; State v. Toomey, 135 Mont. 35, 335 P.2d 1051.

The EQC submits, therefore, that the utilization of all reasonable techniques, such as guidelines, for the performance of its statutory duties is sufficiently authorized by the language of MEPA itself, and by subsequent legislative approval.

III. IT IS PROPER FOR THE COURT TO CONSIDER EQC OPINIONS IN CONSTRUING MEPA, AND IT IS NOT A VIOLATION OF SEPARATION OF POWERS FOR THE COURT TO DO SO.

The Department has put forth the rather incredible argument that it would be a violation of the doctrine of separation of powers for the Court to consider EQC's guidelines in evaluating agency compliance with MEPA. (Department's Reply Brief, p. 11 et seq.) In other words, according to the Department, it is appropriate for the EQC to evaluate agency activity and make recommendations based on those evaluations, but it is an unconstitutional interference with the executive branch to suggest that anyone should pay attention to those recommendations! This argument is patently absurd, but the seriousness of the constitutional issues presented requires a careful response.

It is the EQC's position, as set forth in the preceding arguments, that the promulgation of guidelines as a device for evaluating agency activity is well within the scope of EQC's

statutory authority. The question remains, whether guidelines promulgated by a legislative agency which set forth that agency's interpretation of its authorizing statute, and which indicate that agency's judgment as to what is required of executive and administrative agencies under that statute, but which are not directly enforceable by that agency, constitute a violation of separation of powers. The contention that such a violation has occurred might be made on one of three grounds: (1) Promulgation of guidelines for the administration of a statute is an executive-type activity, and cannot be performed by a legislative agency; (2) Promulgation of guidelines by a legislative agency which propose standards of performance for executive agencies is an undue interference with the executive branch; or (3) Promulgation of guidelines by a legislative agency rather than by the entire legislature is an improper delegation of the legislative power. The EQC contends, and the following discussion will show, that, in the present situation, none of these arguments has merit.

A. Promulgation of Guidelines is a Proper Legislative Action.

The doctrine of separation of powers in the American form of government declares that governmental powers are divided among the three branches of government, and broadly operates to confine legislative powers to the legislature, executive powers to the executive, and judicial powers to the judiciary, and precludes one branch of government from exercising or invading the power of others. (See 1 Am.Jur.2d; Administrative Law § 76, and cases cited.)

The doctrine is implied in the U.S. Constitution, but is made explicit in Article III of Montana's Constitution:

> Section 1. Separation of Powers. The power of the government of this state is divided into three distinct branches--legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly, directly or permitted.

While this provision leaves many questions unanswered (i.e., what powers "properly belong" to the legislative, executive, or judicial branch) it does express a conviction about the manner in which powers may be allocated among the agencies of government. But the distinction between the nature of the power exercised, and the methods utilized in the exercise of those powers, must be made clear. The doctrine of separation of powers does not mean an entire and complete separation of all duties and functions into three distinct categories. Such a rigid classification scheme would be impossible in modern government, even if it were desirable.

In State v. Aronson, 132 Mont. 120, 314 P2d 849 (1957), which has been cited as one of the leading Montana cases on separation of powers, the Supreme Court acknowledged this distinction between powers and methods. Discussing the duties of a legislative committee, the Court stated:

> In the present instance, it is urged that certain of the duties performed by the commission are executive in nature and it is therefore argued that the doctrine of separation of powers prevents the exercise of such functions by members of the legislative branch of government. If the duties were

> classified as legislative in nature, it is apparent that the same doctrine would prevent the exercise of such functions by the executive members of the commission.

The Court resolved this dilemma by recognizing that separation of powers is not intended to impose such arbitrary classifications on the activities of government officials:

> The separation of powers doctrine does not require that we classify these incidental governmental duties, and that we thereafter limit such activity to the particular branch of government first selected. Such subsidiary duties may properly be performed by a variety of governmental agencies.

The Aronson opinion borrowed extensively from a leading California case Parker v. Riley 18 Cal 2d 83, 113 P2d 873, in which the California court considered the constitutionality of a legislative commission which was directed by statute to consult with other government agencies and make recommendations to the legislature. In order to perform these functions, the commission engaged in investigatory fact-finding activities, which were challenged as being executive in nature. The court was clear on this point:

> The doctrine [of separation of powers] has not been interpreted as requiring the rigid classification of all the incidental activities of government, with the result that once a technique or method of procedure is associated with a particular branch of government, it can never be used thereafter by another.

The most recent discussion of separation of powers by this Court is found in State ex rel Judge v. Legislative Finance Committee, 543 P2d 1317, 1321:

> In theory, this section (Section 1, Article IV, 1889 Montana Constitution, almost identical to Section 1,

> Article III, 1972 Montana Constitution * * * effects an absolute separation of the three departments of our government, 'but, while such is the theory of American constitutional government, it is no longer an accepted canon among political scientists; it has never been entirely true in practice.' 12 C.J. 803; Cooley on Constitutional Law, 44; Story on Constitution of the United States, 525.
> * * * That section 1, article 4, does not wholly prevent the exercise of functions of a nature belonging to one department by those administering the affairs of another is recognized in State ex rel Hillis v. Sullivan, 137 P. 392, 48 Mont. 320, wherein Mr. Justice Sanner, speaking for this court, said: 'The separation of the government into three great departments does not mean that there shall be "no common link of connection, or dependence, the one upon the other in the slightest degree" (1 Story's Commentaries on the Constitution, § 525); it means that the powers properly belonging to one department shall not be exercised by either of the others. Constitution art. 4 § 1. There is no such thing as absolute independence.' He then cites numerous instances of the exercise of powers by one department which, from their nature, would seem to belong to another, but which are incidents to the proper discharge of the powers vesting in the department exercising them, or are reposed in the particular department as a matter of convenience in governmental affairs." (Emphasis Supplied)

Thus, this Court has made it abundantly clear that the doctrine of separation of powers is not meant to impose a rigid system of classification on the activities of government agencies. Indeed, a strict application of the separation of powers doctrine as a classification system would make it impossible for many of the administrative and quasi-judicial agencies of state government to carry out their activities. Every time the Board of Health and Environmental Sciences adopts regulations, it is engaged, essentially, in a legislative-type activity. Every time the Board hears a contested case and adjudicates the rights of a petitioner, it is engaged in judicial activity. But we do not hear the Department challenging

these activities as violations of separation of powers.

The crucial factor, then, is not the character of the method or technique utilized by an agency in performing its duties, but rather the nature of the power which gives rise to those duties. If the fundamental purpose and function of an agency is legislative, it may use any reasonable techniques to achieve that purpose, regardless of the characterization of those techniques.

> [T]o the extent such [an agency] exercises any executive function, as distinguished from executive power in the constitutional sense, it does so in the discharge and effectuation of its quasi-legislative... powers, or as an agency of the legislative...department of the government. (emphasis added)
> I.C.C. v. Chatsworth Cooperative Marketing Association 347 F2d 821, 822 (7th Cir., 1965)

The purposes of the EQC, as set out in MEPA, are investigation, consultation, evaluation, and recommendation. The Montana Supreme Court recognizes these as properly legislative in nature:

> ...where the responsibilities imposed are merely those of gathering information and making recommendations, we think the duties must be considered incidental to the lawmaking function. State v. Aronson, 132 Mont. 120, 314 P2d 849 (1957) (emphasis added)

The court continues:

> The duties imposed on the commission...are those of investigation and consultation. The statutory plan culminated in recommendations or proposals made by the commission from time to time. Such activity insofar as it requires classification, may properly be described as the performance of duties which are incidental and ancillary to the ultimate performance of law-making functions by the legislature itself. (emphasis added)

Thus the EQC's objectives are clearly legislative in nature. More to the point, its techniques are also legislative in character.

Nowhere in the Aronson opinion does the court indicate, specifically, what sorts of techniques would be improper for a legislative agency to utilize. Indeed the court acknowledges that,

> intelligent legislation upon the complicated problems of modern society is impossible in the absence of accurate information on the part of the legislators, and any reasonable procedure for securing such information is proper. (emphasis added)

Consider some of the activities which have been judged improper for a legislative agency: exercising the voting power of government-owned stock (Springer v. Philippine Islands, 277 US 189 (1928)); making specific allocations of funds to other agencies (People v. Tremaine, 252 NY 27, 169 NE 817 (1929); Opinion of the Justices, 302 Mass 605, 19 NE 2d 809 (1939)); prosecuting or defending causes of action (Stockman v. Leddy, 55 Colo. 24, 192 P. 220 (1912)). These activities are clearly executive in nature, and have little or no connection to the legislative function of making laws and policies. In contrast, the promulgation of guidelines for the purpose of evaluation, monitoring, interpretation of legislative intent, and making recommendations to the governor and the legislature is intimately related to the legislative process.

Promulgation of guidelines, while traditionally associated with executive and administrative agencies, is essentially a legislative activity. As expressed by Justice Holmes in Prentiss v. Atlantic Coast Line Company, 211 US 210,

> Legislation...looks to the future and changes existing conditions by making a new rule to be applied hereafter to all or some part of those subject to its power.

Promulgation of guidelines which establish standards to be applied to future situations, then, is essentially a legislative function. This function is often delegated by the legislature, within limits, to executive agencies, but that in no way makes such activity an executive prerogative. If the authority to promulgate regulations which have the binding effect of law can be delegated to an executive agency, the authority to issue guidelines which have no such binding effect can certainly be reposed in an agency of the legislature.

It is therefore the contention of the EQC that the Council's purposes are legislative in nature, that the device of the guidelines is essentially a legislative-type technique, and that, in any event, all reasonable and proper techniques may be used by the Council in performing its statutory duties, and that promulgation of guidelines is such a reasonable and proper technique. The doctrine of separation of powers is therefore not violated because of a legislative agency exercising executive powers.

B. Promulgation of Guidelines by the EQC is not an Improper Interference with the Executive Branch.

A second facet of the separation of powers doctrine is involved in the second possible argument, that promulgation of guidelines by EQC is an unconstitutional interference with the executive branch. The Department's argument proceeds something like this: Even though the EQC guidelines are not directly enforceable by EQC, and the Council makes no attempt to enforce them (indeed the Council has no enforcement machinery to carry out such an attempt), the guidelines are put forth by the Council as embodying the procedural and substantive

requirements imposed on executive agencies by MEPA. This judgment by the Council is then adopted by others (for example, citizen groups challenging agency actions in the courts for lack of compliance with MEPA) and the courts are (or may be) persuaded to apply the guidelines to those executive actions. Thus, in order to avoid litigation, executive agencies are (or may be) required to comply with the guidelines. This is deemed, so the argument goes, an improper interference with the executive branch.

As a foundation for this argument, the doctrine of separation of powers is conceived as calling for the independence of each branch of government from the others. While it is true, of course, that part of the meaning of separation of powers is that each branch should be free of undue interference from the other branches, the three branches are more properly described as coordinate or co-equal, than as independent. Indeed, the constitution specifically requires that each branch participate to some degree in the activities of the others. The governor must sign all bills before they become law, and he therefore is part of the legislative process. His pardon power involves him in the judicial process. The legislature's power of impeachment, and the senate's obligation to consent to executive appointments gives the legislative branch influence over the executive and the judiciary. And the courts, with their ultimate power of judicial review, exercise an important check on the activities of the other two branches. Separation of powers does not mean that the three branches should be totally immune from the influence of the other two, but rather that each should be independent enough, and

vital enough, to exert on the other branches those checks and balances envisioned by the framers of the constitution as being the true safeguards against dangerous concentration of power in any one branch. "It is in such checks upon powers, rather than in the classification of powers, that our governmental system finds equilibrium." R. W. Ginnane, The Control of Federal Administration by Congressional Resolutions and Committees, 66 Harvard Law Review 569 (1953).

1. The Legislature's Powers Are Broader Than the Executive's.

There is a natural and healthy tension, therefore, between each branch's desire for independence, and the need for checks and balances. The legislature, however, to a greater extent than the other branches of government, is entitled to freedom and flexibility in performing its functions. It has been said that,

> the executive power is more limited [than legislative powers]: it merely extends to details of carrying into effect the laws enacted by the legislature, as they may be interpreted by the courts. Except where limited by the constitution itself, the legislature may stipulate what action the executive officers shall or shall not perform. State v. Huber, 129 W. Va. 198, 40 SE 2d 11, 18.

The reason that the legislature's powers are broader than the executive's, is that "a state legislature is not acting under ennumerated or granted powers, but rather under inherent powers, restricted only by the provisions of the constitution." State v. Camp Sing, 18 Mont. 128, 44 P 516, 517. See also, State ex rel Du Fresue v. Leslie, 100 Mont. 449, 50 P2d 959.

In Du Fresue v. Leslie, supra, the Montana Supreme Court acknowledged emphatically the broad powers of the legislature.

> The authority of the legislature, otherwise plenary, will not be held circumscribed by implication; but one who seeks to limit it must be able to point out the particular provisions of the Constitution which contains the limitation in clear terms. (Quoting from State ex rel Evans v. Steward, 53 Mont. 18, 161 P 309).
>
> In other words, the legislature, representing the sovereign power of the state, may exercise such power to any extent it may choose, except to the extent it is restrained by the State or Federal Constitutions (50 P2d at 961-2).

2. The Legislature Has the Reponsibility to Oversee Executive Agency Performance to Assure That the Legislative Intent is Adhered To.

The legislature, then, has wide latitude in the exercise of its powers. Moreover, it is the legislature's responsibility to assure that that power is wisely exercised. "One of the fundamental concepts of our form of government is that the legislature, as representative of the people, will maintain a degree of supervision over the administration of governmental affairs." (Gellhorn and Byse, Administrative Law, 82) Executive and administrative agencies do not have a completely free hand in making policy. They are subject to legislative supervision to insure that executive and administrative actions may accurately reflect legislative intent. This is recognized on the Federal level:

> For there to be truly effective checks upon administrative action, the courts must be supplemented by congressional oversight. The Congress is the one great organ of American government that is both responsible to the electorate and independent of the Executive. As the source of delegations of administrative power, it must also exercise direct responsibility over the manner in which such power is employed. (B. Schwartz, An Introduction to American Administrative Law, 70).

The Montana Supreme Court has recognized the same principle on the state level:

> When the legislature confers authority on an administrative agency, it must lay down the policy or reasons behind the statute, and also prescribe standards and guides for the grant of power which has been made...the legislature must set limits on such agency's power and enjoin on it a certain course of procedure and rules of decision in the performance of its function. (Bacus v. Lake County, 138 Mont. 69, 354 P2d 1056, 1061 (1960))

All such powers conferred upon administrative and executive agencies by the legislature must be carefully circumscribed.

> "If the legislature fails to prescribe with reasonable clarity the limits of power delegated to an administrative agency, or if those limits are too broad, its attempt to delegate is a nullity." Montana Milk Control Board v. Rehberg, 141 Mont. 149, 161, 376 P2d 508

3. The Legislature May Utilize a Wide Variety of Instrumentalities to Oversee Executive Activity.

Thus, the legislature, in the exercise of its broad law-making powers, has a responsibility to assure that its policies are adhered to by the executive branch. The legislature has a wide range of options to choose from in performing its oversight responsibilities.

> Where the legislature has authority to provide a governmental regulation and...the nature of the regulation does not require that it be afforded by direct legislative act, such regulation may be provided either directly by the legislature, or indirectly by the legislative use of any appropriate instrumentality where no provision or principle of organic law is thereby violated (emphasis added) Jacksonville v. Bowden, 67 Fla 181, 64 So. 769, 774 (1914).

Legislatures have made use of many "instrumentalities" to keep tabs on executive actions. An obvious one is control of appropriations. Legislative approval of agency performance is tacitly extended or withdrawn depending on the size of the budget

granted to the agency. In addition, amendatory legislation may revise an agency's duties or powers. In Montana, as in may other states, the legislature has ultimate approval authority over all rules and regulations promulgated by administrative agencies, and may, by joint resolution, direct agencies to adopt or amend rules. (82-4203.1, R.C.M. 1947)

A device which Congress has used with some success on the federal level is the establishment of standing or watchdog committees to oversee executive performance in specialized fields. Standing committees have been charged by law with responsibility for exercising "continuous watchfulness" of administrative agencies' execution of their assigned duties. (Section 136 of the Legislation Reorganization Act of 1946 (60 Stat 831)) Special watchdog committees have been established on several occasions to maintain contact with particular agencies. The first such was the Joint Committee on Atomic Energy, established by the Atomic Energy Act of 1946. the JCAE was given jurisdiction over all legislative proposals touching on atomic energy, and was instructed to maintain a constant study of what the Atomic Energy Commission was doing. Another example was the joint watchdog committee established by the Defense Production Act of 1950 (64 Stat 798; 50 USC app. 2061). The following discussion of the functions of that committee (G.J. Maurer, Congressional Oversight of Defense Production, 21 Geo. Wash. L. Rev. 26 (1952)) provides some interesting comparisons with the operations of the EQC.

In an effort to keep abreast of the departmental

> functions under the Act, the committee held 17 sessions of hearings...,and in addition, it requested periodic reports from the agencies and regular departments.... These reports and copies of regulations and press releases were continously surveyed by the committee staff. The result has been that many orders which might have produced inequities and undue hardships were obviated before publication, or were rescinded before any serious damage could be done to the national economy. The committee held frequent across-the-table conferences with officials in charge of controls to keep the Congress and the public informed of developments, to assure compliance with the Congressional intent, and to avoid pitfalls in rules and regulations....
>
> [T]he staff has had frequent conferences with officials in charge of writing and enforcing regulations and disposing of individual cases. In a great many of these instances, regulations were amended as a consequence of the staff discussions. Another feature of this single watchdog committee,...has been to give the administrative agencies a constant and receptive forum where problems and agency requirements could be heard and discussed within the committee or with staff experts. (p. 34-5)

Although the EQC does not claim to be a "watchdog committee" of the type described above, it is instructive to note that a process of consultation, recommendation and communication between executive and legislative branch agencies does have a proper and productive role to play within the limits of the separation of powers doctrine. A legislative committee such as EQC may consult with executive agencies and make recommendations with respect to proposed regulations, procedures or actions in order "to insure compliance with [legislative] intent;" and such recommendations may often lead to revisions of those proposals; yet "undue interference" with the executive branch does not necessarily follow. The EQC's hopes are that the promulgation of its guidelines will facilitate the appropriate level of consultation and communication

among the branches of government.

4. Summary.

The foregoing discussion has established, then, that the doctrine of separation of powers encourages not simply the independence of one branch of government from another, but rather controlled independence within a system of checks and balances; that the legislature possesses particularly broad powers, and is entrusted with an equally broad responsibility to oversee executive activities to insure that legislative intent is adhered to; that the legislature has a high degree of flexibility in developing methods and instrumentalities for the exercise of its powers and the supervision of executive performance.

In this context, let us consider the present situation. Administrative and executive agencies are, with few exceptions, creatures of statute. They are created by the legislature, their duties and functions are defined by the legislature, and the power to perform those functions is granted by the legislature. MEPA in particular imposes on state agencies the responsibility to develop methods and procedures which will contribute to the achievement of the goals and policies of the Act. MEPA also established a legislative agency, the Environmental Quality Council, to review and evaluate executive performance and to make recommendations based on these evaluations. Though an agency of this sort is relatively uncommon in state government, there should be no doubt that it is a legitimate instrumentality devised by the legislature to keep tabs on executive performance. The legislature's responsibility to the people to see that legislative intent is implemented allows no less.

The EQC in no way means to imply that, absent EQC guidelines, there would be an unconstitutional delegation of authority to the executive branch without sufficient standards. The above discussion is simply meant to indicate that, in considering separation of powers issues with respect to legislative control of executive agencies, the danger is generally conceived to be too little supervision by the legislature, rather than too much. In other words, the presumption is in favor of legislative supervision, and, in light of the broad flexibility of the legislative process, that supervision may legitimately take many forms.

If the EQC's opinions and recommendations, issued pursuant to the directives of MEPA, are at times in conflict with executive attitudes, this airing of differences is exactly the sort of communication between governmental agencies which the doctrine of checks and balances requires.

In State ex rel Judge v. Legislative Finance Committee, supra, at p. 1322 this Court quoted Mr. Justice Brandeis in Meyers v. U.S., 272 U.S.52:

> The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy. (Emphasis supplied)

To assert that opinions issued by the legislature or one of its agencies constitute undue interference with the executive branch and a violation of separation of powers, is to assert that the executive branch ought to be completely free and independent of

legislative control. To assert that a court's giving weight to EQC opinions in judging agency compliance with MEPA constitutes undue interference with the executive branch is to call into question the very function of the judiciary, whose responsibility is to act as a check on both the executive and the legislative branches. EQC recommendations, are, after all, based on the belief that the guidelines represent procedures necessary for compliance with MEPA. It is hardly undue interference for a legislative agency to recommend that an executive agency comply with the law, or to express this opinion to the courts.

Such contentions are foreign to our system of government and tend dangerously towards an improper concentration of power in the executive branch. We do not mean to impute any improper motives to those who, through honest concern for the efficient operation of state government, have raised these issues. Nevertheless, it requires a much more direct interference with the operations of the executive branch than the promulgation of guidelines and the issuance of recommendations and reports, to justify a finding that legislative monitoring, through the agency of the Environmental Quality Council, is an unconstitutional violation of separation of powers.

C. Granting Authority to the EQC to Promulgate Guidelines is not An Improper Delegation of Legislative Power.

The final ground on which the Department's argument might be supported is that if, as the EQC contends, MEPA authorizes the promulgation of guidelines, such authorization is an improper

delegation of the legislative power. "The Legislature may not delegate a power to an interim committee which is '... properly exercisable only by either the entire legislature or an executive officer or agency...'" (Department's Reply Brief, p. 13-14; quoting from State ex rel Judge v. Legislative Finance Committee, supra, at 8.) This argument might carry some weight if the EQC claimed for its guidelines the binding effect of statutes or regulations, or attempted to enforce them as such. This is simply not the case.

As pointed out earlier, the guidelines were developed as a device to evaluate agency activity in light of the policies and requirements of MEPA. Typically, an agency action will be reviewed by the EQC staff, the extent of compliance with the guidelines is determined, and appropriate comments are made to the agency. In this way, the guidelines not only make uniform and systematic judgments possible for the EQC staff, but they also provide assistance to the agencies in reshaping their procedures. Since the guidelines represent EQC's judgment as to minimum requirements for compliance with MEPA, it is natural for EQC to encourage agencies to follow the guidelines.

In the course of commenting on EISs prepared by state agencies, the EQC staff has pointed out to agencies those portions of their EISs which in the judgment of the staff have failed to comply both procedurally and substantively with MEPA and the standards outlined in the guidelines. On several occasions, the EQC staff has recommended that deficient parts of the state agency EIS be redone. Likewise, the EQC has on occasion suggested that because of serious

deficiencies entire EISs be redone. However, in its interaction with the state agencies, the EQC staff has never taken the position that with respect to EIS deficiencies it had the authority to enforce its recommendations.

Several state agencies have expressed concern that the use of mandatory language in the guidelines is meant to imply that EQC has enforcement authority. This is not the case. Mandatory language is used in order to express in the strongest possible terms EQC's belief that compliance with the procedural and substantive policies of MEPA requires adherence to the procedures and interpretations set out in the guidelines. The guidelines do not say, "An agency must do X in order to be permitted to carry on its activities." Rather, the guidelines say, "An agency must do X, in the judgment of the EQC, in order for its actions to be in compliance with MEPA."

The guidelines represent, in other words, EQC's interpretation of the legislative intent behind MEPA. The guidelines have been developed in such a way that when they are followed, MEPA is almost certainly satisfied (at least procedurally). But when agency action departs substantially from the guidelines, compliance with MEPA, in EQC's judgment, is doubtful. The guidelines, then, are a device for appraising agency compliance with MEPA. An agency action which departs substantially from the guidelines has been appraised and found lacking.

The Department seems to be unable to understand that advisory guidelines which represent the best judgment of the agency entrusted

by law with the responsibility to oversee compliance with MEPA, are entitled to careful consideration by both the executive and judicial branches of government, even though they do not have the binding effect of statutes or regulations. Ultimately, of course, it is for the Courts to give the final and authoritative interpretation to statutes, and to determine the constitutionality of government activity. But the EQC believes that the Courts are entitled to consider all relevant evidence and opinions in making those determinations. The EQC also believes that the Council's opinions are entitled to special consideration because of its specific responsibility to monitor compliance with MEPA. If an agency's actions depart substantially from the requirements of the EQC guidelines, that agency should bear the burden of showing that it has not violated MEPA.

CONCLUSION

For the reasons given above, the EQC prays the Court to find that the Montana Environmental Quality Council is authorized by MEPA to issue guidelines, that such guidelines do not constitute a violation of the doctrine of separation of powers, and that the guidelines are entitled to great weight in the Court's deliberations in determining agency compliance with the Montana Environmental Policy Act.

Respectfully submitted,

STEVEN J. PERLMUTTER
Attorney for Amicus Curiae
Montana Environmental Quality Council
Box 215 Capitol Station
Helena, MT 59601

CERTIFICATE OF SERVICE

I, STEVEN J. PERLMUTTER, attorney for amicus curiae Montana Environmental Quality Council, hereby certify that on the _____ day of _____1976, I served true and correct copies of the foregoing SUPPLEMENTARY BRIEF OF AMICUS CURIAE upon the attorneys named below by depositing the same in the United States mails, postage prepaid, and securely sealed in envelopes addresses to them at their following last-know addresses, respectively:

JAMES H. GOETZ
Goetz and Madden
P.O. Box 1322
Bozeman, Montana 59715
Attorney for Plaintiffs and Respondents

A. MICHAEL SALVAGNI
G. STEVEN BROWN
1424 9th Avenue
Helena, Montana 59601
Attorneys for Defendants and Appellants

WILLIAM CONKLIN
Dzivi, Conklin, Johnson & Nybo
529 Northwestern Bank Building
Great Falls, Montana 59401
Attorneys for Intervenor and Appellants

DONALD R. MARBLE
P.O. Box 649
Chester, Montana 59522
Attorney for the League of Women Voters of Montana, Amicus Curiae

RICHARD M. WEDDLE
1424 9th Avenue
Helena, Montana 59601
Attorney for the Department of Community Affairs, Amicus Curiae

ANDERSON, SYMMES, FORBES, PEETE & BROWN
100 Transwestern Building
Billings, Montana 59101
Attorneys for Montana Home Builders Association, Amicus Curiae

_____
STEVEN J. PERLMUTTER